

February 12, 2003

Mary Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

RE: The Berkshire Gas Company, D.T.E. 02-81

Dear Secretary Cottrell:

Pursuant to the procedural schedule established by the Hearing Officer, the Attorney General submits his initial Brief addressing the request by the Berkshire Gas Company ("Berkshire" or "Company") for approval of a Gas Purchase Agreement ("Purchase Agreement") between Berkshire and the BP Energy Company ("BP Energy"). The Attorney General opposes the Purchase Agreement with BP Energy since contracting for a single supplier of gas does not meet the directives of the Department of Telecommunications and Energy ("Department") or the Company's own portfolio objective of supply diversity. Given the existing complicated business relationship between Berkshire and BP Energy under the gas portfolio optimization agreement, the Purchase Agreement is not an arms length transaction and should be rejected.

On November 27, 2002, the Company filed a petition for approval of the Purchase Agreement with the Department. On January 8, 2003, Boston Gas Company, Colonial Gas Company and Essex Gas Company, each doing business as KeySpan Energy Delivery New England, filed a joint petition to enter this proceeding as a limited participant. On January 13, 2003, the Attorney General filed his notice of intervention as of right, pursuant to G. L. c.12, § 11E. The Department conducted a public hearing followed by an evidentiary hearing on the same day, January 23, 2003. During the hearing the Department issued a briefing question to the Company regarding the issue of diversity of supply.

The Company seeks to purchase one hundred per cent of its domestic natural gas supply from a single entity. Exh. AG 1-2. A single supplier for gas contravenes the Department's recent directive to Berkshire:

The Department has established that a company should not limit the purchase of its gas supply requirements to one supplier. See eg., *Commonwealth Gas Company*, D.P.U. 94-174-A (1996). In anticipation of Berkshire's need to seek replacement gas resources, the Department directs Berkshire to issue an RFP and ***to negotiate gas supply purchase agreements with various suppliers.*** Berkshire shall submit documentation on the RFP process and the purchase agreements to the Department for our approval.

Berkshire Gas Company, DTE 01-41, p.12 (2001) (emphasis added). The Department expressly directed the Company to negotiate and contract with more than one supplier. Furthermore, the Company must prove that the proposed agreement is consistent with the Company's portfolio objectives and compares favorably with the range of alternative options reasonably available to the company and its customers. *Commonwealth Gas Company*, D.P.U. 94-174-A, p. 27 (1996). In this case Berkshire has been unable to explain adequately how a single supplier meets the objective of supply diversity, especially considering other favorable responses to the Company's Request For Proposal ("RFP"). Exhs. AG 1-2, 1-5 – 1-7; Transcript pp. 19-21, 23-24.

The Purchase Agreement with BP Energy is not an arms length transaction, and should receive heightened Department scrutiny. *Hingham Water Company*, D.P.U. 88-170, p. 21 (1989) (affiliate transactions); *New England Telephone and Telegraph*, DPU / DTE 96-73/74, 96-75, 96-80/81, 96-94 Phase 4-G, p. 12 (1998) (selection of prequalified outside vendors does not provide least cost services to a utility). In 2002 the Department approved a portfolio optimization agreement between Berkshire and BP Energy. *Berkshire Gas Company*, D.T.E 02-19 (2002). Under this agreement, BP Energy shares in each dollar "saved" in the purchasing and dispatching of Berkshire's domestic gas portfolio. The portfolio optimization agreement also allows BP Energy to profit from gas provided under the Purchase Agreement.

The Department should reject the proposed Purchase Agreement. If the Department does not reject the contract in its entirety, then the Department should order the Company immediately to commence negotiations with other favorably ranked RFP respondents in order to obtain at least one other source of supply. In the alternative, the Department should order Berkshire to issue another RFP which divides its supply requirements into two or more equal amounts.

Sincerely,

Alexander J. Cochis
Assistant Attorney General

cc: Service list

